STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

MISTY MAY BRANDON, as Administratrix of the Estate of Vincent Van Winkle, Deceased,

Plaintiff,

-against-

ROBERT M. WITBECK d/b/a ROBERT M. WITBECK GENERAL CONTRACTING and TOWN OF EAST GREENBUSH,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI: 41-0130-2008 Index No. 223305

Appearances: Law Offices of Peter R. Garcia, P.C.
Attorney For Plaintiff
38 Cedar Street
Stony Brook, NY 11790-1736

Shantz & Belkin
Attorney For Defendant
Town of East Greenbush
26 Century Hill Drive, Suite 202
Latham, NY 12110

Mandel Clemente, P.C.
Attorney For Defendant
Robert M. Witbeck d/b/a
Robert M. Witbeck General Contracting
120 DeFreest Drive
Rensselaer Technology Park
North Greenbush, NY 12180

DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiff commenced the above-captioned action to recover money damages for

injuries the decedent, Vincent Van Winkle, allegedly suffered on August 7, 2006 when a trench in which he was working collapsed. As a part of his case, the plaintiff intends to present expert testimony at trial to demonstrate that the soil at the work site was inherently unstable; that the condition was such that it required installation of some form of protection to prevent the trench from collapsing; and that the danger was reasonably foreseeable. Defendants, on the other hand, intend to present their own expert to rebut such testimony.

Towards this end, in June 2011, the defendants retained Gifford Engineering as their defense expert. The plaintiff, on July 20, 2011, retained David Myers of Greystone Engineering as their expert. Mr. Myers, a licensed engineer, visited the accident site on August 17, 2011 and took soil samples. He had worked with Gifford Engineering in the past and, being unaware that Gifford Engineering had been retained by the defendants, contacted Gifford Engineering and requested that they perform an analysis of the soil samples he had collected. Mr. Myers subsequently delivered the soil samples to Gifford Engineering, which performed the soil analysis. It was not until October 2011, when defense counsel received plaintiff's expert disclosure which indicated that Mr. Myers would rely, in part, upon laboratory test results prepared by Gifford Engineering, that the defendants realized that plaintiff should be made aware that Gifford Engineering was their expert. Defense counsel promptly did so. Attempts to resolve this issue have been unsuccessful.

Plaintiff has made a motion to disqualify Gifford Engineering from providing any further engineering services to either plaintiff or the defendants, and from testifying at trial. Plaintiff also seeks an order permitting plaintiff to re-inspect the work site, directing Gifford Engineering and/or the defendants to reimburse plaintiff for the cost of the re-inspection,

setting a timetable for expert witness disclosure, and scheduling a new date for trial.[1]

In support of the motion, Counsel for plaintiff argues that there exists an inherent conflict of interest, and indicates that he would not have allowed Mr. Myers to request Gifford Engineering to perform the soil testing had he been aware that the defendants had already retained that firm as their expert. Counsel further indicates that when he telephoned Greg Gifford (of Gifford Engineering) on February 1, 2012 to speak to him about the matter, he refused to do so unless authorized by the attorneys for the defendants.[2] In plaintiff's view Mr. Gifford "has aligned himself" with the defendants.

In opposition to the motion, counsel for the defendant Town of East Greenbush points out that the Town retained Gifford Engineering first. He further indicates that plaintiff did not identify anyone employed by Gifford Engineers, including Greg Gifford, in their expert disclosure. He nonetheless indicates that he is willing to stipulate that he will not challenge the chain of custody of soil samples or test results.

Counsel for the defendant Robert M. Witbeck makes essentially the same argument as that of Counsel for the Town, that plaintiff has failed to identify Gregory Gifford and/or an employee of Gifford Engineering as an expert witness in plaintiff's expert disclosure. In Counsel's view, the only manner in which plaintiff could call Gifford Engineering or its employees, is as a fact witness; and then, the only employee who should be called is Ben Rosenthal, P.E., the individual who received the soil samples, and can establish the chain of custody thereof. In addition, said Counsel (as did Counsel for the Town of East Greenbush)

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[1]Trial is currently scheduled to commence on May 14, 2012.

[2]According to David Myers, who called Mr. Gifford on the same day, Mr. Gifford also refused to talk to him.

expresses her willingness to enter into a stipulation with regard to the authenticity, validity and chain of custody of the sieve test results.

Initially, although the defendants maintain that plaintiff waived any right to object to defendant's use of Gifford Engineering as an expert witness, the Court finds that there is nothing in the record which demonstrates a clear intention to waive the objection. The Court finds that the argument has no merit.

It is well settled that the Court possesses inherent power to disqualify an expert witness to preserve the fairness and integrity of the judicial process (Roundpoint v V.N.A. Inc., 207 AD2d 123, at 125 [3d Dept., 1995]). As the Court in Roundpoint stated:

> "To resolve the issue of whether a claimed conflict of interest disqualifies an expert, courts have used a two-step analysis, first seeking to determine if it was objectively reasonable for the party claiming to have initially retained the expert to conclude that a confidential relationship existed between them and then, secondly, to ascertain if any confidential or privileged information was disclosed by said party to the expert (see, Wang Labs. v Toshiba Corp., 762 F Supp 1246, 1248; Great Lakes Dredge & Dock Co. v Harnischfeger Corp., 734 F Supp 334, 337; Shadow Traffic Network v Superior Ct., 24 Cal App 4th 1067, 29 Cal Rptr 2d 693). Affirmative answers to both inquiries requires disqualification while negative responses to either inquiry will likely result in a finding that disqualification would not be appropriate (see, Wang Labs. v Toshiba Corp., supra, at 1248)." (Roundpoint v V.N.A. Inc., supra, at 125]).

In this instance, ignoring the fact that it was the defendants who initially retained Gifford Engineering, plaintiff has failed to adequately address the issue with respect to the existence of a confidential relationship between plaintiff and Gifford Engineering; or even between Greystone Engineering and Gifford Engineering. While plaintiff maintains that there such a relationship existed, plaintiff fails to demonstrate this by providing facts to

support this conclusion. Of equal importance, there is no specific indication that any privileged or confidential information was communicated to Gifford Engineering. In this respect, plaintiff has failed wholly to satisfy the two-part test set forth in Roundpoint v V.N.A. Inc. (supra). Moreover, and apart from the foregoing, the Court does not find plaintiff's argument particularly compelling from the standpoint that plaintiff has not demonstrated that plaintiff can not secure an alternate person or firm to perform a soil analysis, and/or that the soil analysis can only be reproduced at an exorbitant cost.[3]

Under such circumstances, the Court finds that plaintiff's motion do disqualify Gifford Engineering Firm must be denied. With respect to plaintiff's motion to re-inspect the site, the Court is of the view that if the plaintiff does not desire to utilize Gifford Engineering, the plaintiff is free to retain a new firm to perform a soil analysis. While plaintiff requests that the Court direct Gifford Engineering to reimburse her for the expenses of a re-inspection, the Court does not have jurisdiction over Gifford Engineering to grant such relief; nor the legal or factual basis to do so. Similarly, there are no grounds to hold the defendants liable for the expense inasmuch as it does not appear their actions were in any respect improper.

As noted, both defendants have proposed entering into a stipulation in which they would agree not to challenge the chain of custody of the soil samples, and not to challenge the soil test results. Counsel for the Town of East Greenbush also indicates that it would not object to Ben Rosenthal, P.E. of Gifford Engineering from testifying with respect to the soil test results, and states that there would be no need to mention Gifford Engineering during his

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[3]Plaintiff indicates that Gifford Engineering was paid $300.00 for the soil analysis.

testimony. The Court agrees, and will issue a protective order which directs that in the event the plaintiff and defendants enter into such a stipulation that the defendants be precluded, during cross-examination of plaintiff's witnesses, from eliciting testimony which in any way, directly or indirectly, discloses that Gifford Engineering (or anyone on its behalf) performed the soil test. Similarly, the Court will direct that during the presentation of defendants' case, the defendants will not elicit testimony from their witnesses which in any way, directly or indirectly, discloses that Gifford Engineering (or anyone on its behalf) performed the soil test.

In view of the foregoing, the Court will deny the motion as to all relief pertaining to the soil test and/or Gifford Engineering, other than plaintiff's request to re-inspect the accident site, obtain soil samples and conduct a second soil analysis.

Plaintiff and the defendants have raised concerns with regard to various scheduling issues which are becoming ever more critical by virtue of the May 14, 2012 trial date. The plaintiff has requested that the trial be rescheduled. The defendants request a minimum of thirty days to make dispositive motions. The Court will schedule a telephone conference call to address these issues.

Lastly, as a part of the relief requested in the instant motion, plaintiff requests an order "setting a time table for expert disclosure". The last of several prior deadlines for plaintiff to serve expert disclosure was September 15, 2011 (as established in a letter dated August 22, 2011, "so ordered" by the Court on August 25, 2011). In plaintiff's reply affirmation to the instant motion, counsel for the plaintiff indicates that in recent conversations with defense counsel he had mentioned to them that he still needed to disclose a medical expert.

He states that both defense counsel indicated that this would not be a problem. In a letter dated March 13, 2012, counsel for the defendant Town of East Greenbush strongly disagrees, and objects to further expert disclosure. The Court will deny this relief without prejudice, to be addressed during the telephone conference.

Accordingly, it is

ORDERED, that plaintiff's motion to disqualify Gifford Engineering from performing engineering services and/or acting as an expert witness for either party is denied; and it is further

ORDERED, that plaintiff's motion for an order directing Gifford Engineering and/or the defendants to reimburse the plaintiff for the expense of a second site inspection and soil analysis is denied; and it is further

ORDERED, that that portion of plaintiff's motion which seeks leave to re-inspect the accident site, collect soil samples, and perform a second soil analysis is granted; and it is further

ORDERED, that the defendants be precluded at trial, during cross-examination of plaintiff's witnesses, from eliciting testimony which in any way, directly or indirectly, discloses that Gifford Engineering (or anyone on its behalf) performed the soil test; and that during the presentation of defendants' case, the defendants will not elicit testimony from their witnesses which in any way, directly or indirectly, discloses that Gifford Engineering (or anyone on its behalf) performed the soil test; and it is further

ORDERED, that plaintiff's motion for an order setting a timetable for expert witness disclosure is denied, without prejudice; and it is

ORDERED, that a telephone conference be and hereby is scheduled to be held on **Thursday, March 22, 2012 at 11:00 a.m.,** with the Court initiating the call.

This shall constitute the decision and order the Court. The original decision/order is returned to the attorney for the defendant Town of East Greenbush. All other papers are being delivered to the Supreme Court Clerk for delivery to the County Clerk or directly to the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

Dated: March 19, 2012
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Defendants' Notice of Motion dated February 2, 2012, Supporting Papers and Exhibits
2. Affirmation of Todd C. Roberts, Esq., dated February 15, 2012
3. Reply Affirmation of Peter R. Garcia, Esq., dated March 5, 2012
4. Letter dated March 13, 2012 of Todd C. Roberts, Esq.